

# Am I entitled to specific performance?

February 17, 2021

## Specific Performance

### ***Jad Rentals of Youngstown, LLC v. Cox, 7th Dist. Mahoning No. 19 MA 0096, 2021-Ohio-304***

In this appeal, the Seventh Appellate District affirmed the trial court's decision, agreeing that the buyer was entitled to an award of specific performance to purchase the seller's property.

**The Bullet Point:** Real estate is almost always considered unique. Consequently, specific performance is the common remedy in Ohio courts for breach of contract to purchase real estate. To be awarded specific performance, a buyer must first succeed on their claim for breach of contract. As such, a buyer must demonstrate that a contract existed, they fulfilled their obligations under the contract, the seller failed to fulfill their obligations, and damages resulted from the seller's failure. In this case, the seller failed to fulfill her obligations under the real estate contract with the buyer. The seller's property was unique, and the buyer entered into the contract to purchase the property because of the property's specific characteristics. However, although specific performance is the common remedy, it is not awarded for all breaches of a contract to purchase real estate. Specifically, specific performance is not awarded in Ohio where it will cause "unreasonable hardship, loss or injustice to the party in breach." Here, the seller failed to present any evidence that specific performance would cause her any hardship or injustice. As such, the buyer was entitled to an award of specific performance to purchase the seller's property.

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## Economic Loss Doctrine

### ***Windsor Med. Ctr., Inc. v. Time Warner Cable, Inc., 5th Dist. Stark No. 2020CA00085, 2021 Ohio App. LEXIS 159 (Jan. 20, 2021)***

In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that the economic loss rule did not bar the plaintiff's fraud claim as the defendant engaged in a pattern of misrepresentations, false promises, and threats.

**The Bullet Point:** Under the so-called "economic loss rule", a plaintiff who has suffered solely economic loss due to the defendant's negligence cannot recover damages under a tort claim. This rule is based upon the principle that there is generally no duty to exercise reasonable care to avoid economic harm to others that does not arise from a physical harm. Simply stated, in the absence of privity of contract, there is generally no duty to exercise reasonable care to avoid economic loss to others. That being said, the economic loss rule does not apply where

the defendant commits an intentional tort independent of, but in connection with, a breach of contract, and there are resulting damages that are separate and distinct from said breach of contract. For example, negligent misrepresentation, breach of fiduciary duty, fraud, and conversion are all exceptions to the economic loss rule.

In this case, the plaintiff's fraud claim went beyond the defendant's failure to abide by the terms of the parties' contract. The court found that the defendant engaged in a pattern of misrepresentations and deceptive and fraudulent billing practices. Perhaps most notably, the defendant fraudulently represented it would resolve a billing issue but instead disconnected service, forcing the plaintiff "to pay what amounts to a ransom." Likewise, the court found the damages sought by the plaintiff were the result of the defendant's deceptive and fraudulent billing, as opposed to amounts owed or disputed under the parties' contract. As such, the economic loss rule did not apply and the plaintiff was entitled to damages for its fraud claim against the defendant.

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## Judicial Estoppel

### ***SW Acquisition Co. v. Akzo Nobel Paints, L.L.C.*, 8th Dist. Cuyahoga No. 109236, 2021-Ohio-309**

In this appeal, the Eighth Appellate District reversed the trial court's decision and remanded the case, finding that the trial court exceeded its authority by prematurely addressing the issue of judicial estoppel, which was a matter to be resolved by the arbitrator.

**The Bullet Point:** In this case, the trial court exceeded its authority by looking through the plaintiff's petition to prematurely review whether judicial estoppel would prevent the plaintiff from successfully pursuing its claims against the defendant, instead of simply compelling the case to arbitration. Here, the defendant argued that the doctrine of judicial estoppel applied and asserted that the plaintiff, through its successor-in-interest, (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the bankruptcy court. As the appellate court noted, the doctrine of judicial estoppel is a merit-based defense that does not concern the validity or enforceability of an arbitration provision. As the sole issue to be decided was whether there was a valid and enforceable arbitration agreement, and, if so, whether the defendant failed to perform under the written agreement for arbitration, the trial court exceeded the scope of its jurisdiction by addressing the issue of judicial estoppel.

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